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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARIO MOLINA, Defendant and Appellant.	B207493 (Los Angeles County Super. Ct. No. BA301665)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Modified and, as modified, affirmed with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Mario Molina appeals from the judgment entered following his convictions by jury on two counts of first degree murder (Pen. Code, § 187; counts 1 & 2) with, as to each count, findings that appellant personally and intentionally discharged a firearm causing great bodily injury and death (Pen. Code, § 12022.53, former subds. (d) & (e)(1)), appellant committed the offense for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(A)) and, as a special circumstance finding, that he committed multiple murders (Pen. Code, § 190.2, subd. (a)(3)). The court sentenced appellant to prison for life without the possibility of parole, plus 75 years to life. We modify the judgment and, as modified, affirm it with directions.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that on January 22, 2003, in Los Angeles, Erick Amaya and Ileana Lara were seated in the front seat of a car, and appellant and a confederate were seated in the back seat. Appellant and his confederate shot and killed Amaya (count 1) and Lara (count 2) for the benefit of a criminal street gang. The People's evidence against appellant included statements appellant made to law enforcement personnel on April 12 and April 26, 2006, as discussed below.

CONTENTIONS

Appellant claims (1) the trial court erred by failing to exclude appellant's confession to police detectives on the ground it was involuntary, (2) imposition of a Penal Code section 12022.53, former subdivision (d) enhancement on each of counts 1 and 2 violated the multiple conviction rule and double jeopardy principles, and (3) the abstract of judgment must be amended to delete any reference to a former Penal Code section 1202.45 parole revocation fine.

DISCUSSION

1. *Appellant's Statements Were Voluntary.*

a. *Pertinent Facts.*

(1) *People's Evidence.*

In February 2008, appellant brought a pretrial motion to exclude his statements to law enforcement personnel on the ground, inter alia, that the statements were obtained in violation of his right to due process. At the hearing on the motion, the evidence established as follows. On April 12, 2006, appellant was in a New Orleans jail and being held for a Los Angeles robbery, and Los Angeles Police Detective Richard Arciniega and his partner, Los Angeles Police Detective Thompson, arrived at the jail to interview appellant about the present offenses.

Arciniega testified the jail was a makeshift jail created after Hurricane Katrina, and conditions were terrible. Federal Bureau of Investigation (FBI) Agent Luis Rivero, and a fourth person who was possibly an FBI agent, were present with the detectives. When Arciniega arrived, appellant was talking to Rivero about appellant's concerns. Rivero told Arciniega that appellant was very cooperative and eager to talk, and was not hiding anything.

Prior to Arciniega's first interview of appellant, Arciniega was aware that an FBI agent previously had spoken to appellant about his immigration status and, during that conversation, appellant had admitted membership in the Mara Salvatrucha (MS-13) gang. Arciniega was unaware of any conversations between appellant and the FBI in which the FBI had offered to protect appellant's family in exchange for information about the gang. Prior to Arciniega's first interview of appellant, appellant had expressed concern about being at the jail and about allegedly having been robbed by jail personnel. Appellant's main concern was about being at the jail.

During Arciniega's first interview of appellant, Arciniega advised appellant that Arciniega and Thompson were present to interview appellant about the present offenses, and the detectives were not involved with the robbery investigation. Arciniega later advised appellant of his *Miranda* rights and appellant waived them. Appellant reiterated

he wanted to get out of the jail. He also said he wanted the detectives to call his mother, let her know he was okay, and to call her when appellant and the detectives returned to Los Angeles. Appellant wanted to return to Los Angeles to resolve his robbery case.

During Arciniega's first interview of appellant, appellant indicated as follows. Appellant's gang had approved his being killed. He was concerned for himself in New Orleans and for the safety of his mother in California. He was also concerned about how safe he would be once he was delivered to the Los Angeles County jail. Arciniega testified that "[t]hose were [appellant's] big concerns." Arciniega indicated to appellant that Arciniega would try to help appellant with "those concerns" with "the FBI and [appellant's] mother."

The transcript of the recording of Arciniega's first interview with appellant suggests[1] that the following occurred during the interview. Arciniega indicated that Arciniega and another person present were going to see what appellant knew about the present offenses. Appellant indicated he did not know a lot. Arciniega and another person had spoken to the FBI. Arciniega and someone had spoken to "the other FBI" agent who had met with Arciniega and another person. Arciniega commented to appellant about what had to be done with appellant's family.

The following later occurred: "[Arciniega]: . . . The FBI--he said that they can't do anything with you if you don't help us. [¶] [Appellant]: Uh-huh. [¶] [Arciniega]: Okay? Those things that we're talking about with you first. Okay? So, that one [*sic*] we want to do. [¶] [A Third Party]: And that's why we're talking to him first before [unintelligible] [¶] [Arciniega]: Okay? [¶] [Appellant:] Yes."

The following also occurred: "[Arciniega:] . . . like I told you, the other man, . . . what can also happen, okay? . . . [¶] [Appellant:] To my family and me too. [¶]

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[1] The parties effectively concede the recording of the first interview was of questionable quality. Moreover, the transcript, based on the recording, refers to "MV1" and "MV2" as "male voice 1-interviewee" and "male voice 2-interviewer." The parties concede MV1 and MV2 are appellant and Arciniega, respectively. Except as indicated below, capitalization is omitted from quotes of the transcript.

[Arciniega]: Well you too. . . . [¶] [Appellant:] Um-hum. [¶] [Arciniega]: That . . . it's not necessary if you go to county, you know? [¶] [Appellant:] Um-hum. [¶] [Arciniega:] And the other ones that, . . . have [SL][2] immigration and . . . you're on probation there in Los Angeles, right? [¶] [Appellant:] Yes. [¶] [Arciniega:] You have it in [UI][3] times because of that. [¶] [Appellant:] Um-hum. [¶] [Arciniega:] Violations. [¶] [Appellant:] Violations. [¶] [Arciniega:] Yeah. So, . . . they can send you to . . . county but you can call and they'll move you somewhere else. . . . Okay? . . . Because if you go to . . . Wayside or county . . . [¶]…[¶] you have problems. We already know. All right? . . . So, those things - we want to know about, . . ." Appellant then told Arciniega to "[a]sk the questions."

Arciniega denied that he or anyone else ever promised appellant any form of leniency in exchange for his giving a statement to Arciniega with respect to the murders. Arciniega denied ever threatening appellant in any way in order to get him to give Arciniega a statement. Nothing was promised in either the first or second of Arciniega's interviews of appellant. Arciniega never told appellant anything to the effect that in order to get Arciniega's help for appellant's safety, appellant would have to make a statement about this case.

During Arciniega's first interview of appellant, appellant initially denied involvement in the killings. He admitted being present with a person named Negro and others on Rampart when a person named Marvin, who was close to a person named Comandari, received a call from Comandari. Comandari was in Guatemala. Comandari told Marvin that Marvin was going to take Amaya and Lara to El Salvador. Comandari then told Marvin to kill them because of a drug rip-off. Negro and Marvin were supposed to pick up Amaya and kill him. Appellant concluded Lara was killed because she was Amaya's wife.

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2 "SL" is the transcript's designation for "sounds like."

3 "UI" is the transcript's designation for "unintelligible."

Arciniega later, as a ruse, told appellant that Arciniega had phone calls that placed appellant at the scene of the shootings, i.e., calls during which appellant was on the phone talking to people about it. After Arciniega told appellant that appellant had been heard on the phone indicating he had been present at the scene, appellant admitted to Arciniega that appellant had been present. Appellant acknowledged entering the car with Amaya, Lara, and Negro, but appellant claimed he did so only to get a ride. According to appellant, he later exited at a bus stop and subsequently heard gunfire. Appellant thought someone was shooting at him.

Appellant continued during the first interview to express concern for the safety of himself and his mother. At one point, Arciniega told appellant that Arciniega could help appellant. On another occasion, Arciniega said, "Okay, but the truth. Don't start with more lies." Appellant replied no. Arciniega also said, "Okay? It's the only way we can help you." Appellant replied, "I know."

The following exchange then occurred: "[Arciniega:] Okay. You want the help, all right? They're [apparently referring to the FBI] . . . going to ask difficult things--well like these, you know? [¶] [Appellant:] Yeah. [¶] [Arciniega:] Difficult stuff. Huh? But it's the only way that we can-- [¶] . . . [¶] [Appellant:] Okay, I told him. I didn't know that you were going to come [UI]. I even said to him, 'I know lots of stuff, I'm willing to help you.' [¶] [Arciniega:] Yeah. [¶] [Appellant:] [UI] And I told him, I'm willing to help you guys but in exchange I want you to protect me and my family. And . . . if anything is going to happen . . . let it be . . . something fair for me. . . . I told him that. I mean because there's stuff that I know . . . I know that . . . they used me in that game."

The following colloquy also occurred: "[Appellant:] . . . without me knowing that you guys were going to come [I had] already talked to him. . . . [¶] . . . [¶] Those people--I told him. They have many hands [UI]. . . . [¶] [Arciniega:] Yeah. And also, like I told you . . . with them we bring [UI]. You know, to protect. . . . [¶] [Appellant:] She said that he was going to talk to his boss to see if he can protect me. . . . [¶] . . . [¶] I'm not going to talk and in the end I'm going to go to [UI]."

The colloquy continued, "[Arciniega:] The thing is that we can do something for your mother. Okay? . . . [¶] [Appellant:] And . . . for me? [¶] [Arciniega:] And for you we're . . . you don't want to stay here. [¶] [Appellant:] It's better if [whatever] is going to be cleared up gets cleared up. I told him. I want to go to California. . . . I'm going to clarify what's going to be clarified. . . . [¶] . . . [¶] I don't want to stay here . . . . I can't talk. [¶] [Arciniega:] Yeah. [¶] [Appellant:] . . . If they deport me, they deport me or, . . . I fix my legal problems . . . . And I told the . . . judge that . . . [and] I didn't want to pay because I'm not a gang banger anymore. I have my [SL] children."

When appellant was in New Orleans, he indicated his mother was going to get him an attorney when appellant returned to California. Arciniega thought appellant was referring to his "probation [case] or something." Appellant asked when Arciniega was going to extradite appellant from New Orleans, but that did not pertain to the present murder case, which had not yet been filed. Appellant was merely indicating that his mother was going to get him an attorney, and nothing else was said about that matter. The first interview between Arciniega and appellant lasted about an hour. The court took judicial notice that the complaint for the arrest warrant in this case was filed on April 25, 2006.

On April 26, 2006, police returned appellant to Los Angeles and brought him to the Lennox Sheriff's station. Arciniega explained appellant's rights to him and asked if appellant remembered the detectives reading them to him. Appellant acknowledged that he did, appellant continued the waiving of his rights, and he agreed to continue to speak with Arciniega about the incident. Arciniega then conducted a second interview of appellant which lasted about 10 to 15 minutes.

During the second interview, appellant reiterated the substance of his first interview, but admitted knowing about the intended killings of Amaya and Lara. Appellant said he spoke directly to Comandari before the shootings, Comandari ordered appellant to do the hit with Negro, and appellant agreed to comply. Appellant also told Arciniega that, as planned, Marvin and Jute picked up appellant and Negro after the shootings.

Appellant indicated to Arciniega during the second interview that appellant had spoken to Comandari, and Comandari had said he would talk to other gang leaders and make sure they would not approve the killing of appellant. Appellant did not ask Arciniega for protection for appellant or his mother when appellant was at Lennox.

Arciniega had no recollection of appellant broaching the subject of his attorney when Arciniega was at Lennox, or of appellant indicating to Arciniega that appellant's attorney wished to speak with Arciniega. Arciniega denied that he, or his partner in Arciniega's presence, ever indicated to appellant that he did not need a lawyer because he was cooperating with Arciniega's department.

(2) *Defense Evidence*.

In defense, appellant testified as follows. Appellant was first interviewed in New Orleans by an agent whom appellant could not identify. The agent interviewed appellant only about general MS-13 information and whether appellant was a member of that gang. Appellant spoke with the FBI agent for five minutes. Appellant expressed concern for the safety of himself and his mother. The FBI agent said he would relay appellant's concerns to the agent's supervisor. The FBI agent did not ask appellant anything about the instant murders, nor did appellant speak with the agent about them.

Several days later, appellant spoke with Arciniega and, about 45 minutes later, with a person named Flores whom appellant identified as an FBI agent. Appellant admitted that when he spoke to Arciniega in New Orleans, Arciniega read appellant his rights and appellant agreed to speak with Arciniega. Appellant advised Arciniega and Flores about appellant's concern for the safety of himself and his mother. Arciniega and Flores told appellant that they were going to protect appellant and his family in return for appellant cooperating with them. Arciniega told appellant that Arciniega had spoken to the FBI, and if appellant was unwilling to continue to cooperate, they would not protect appellant or his family, and appellant would be "included in the case." According to appellant, Arciniega and Flores were looking for information about Comandari. Appellant claimed Flores was not interested in appellant's murder case.

Appellant acknowledged that Arciniega did not promise appellant anything. When appellant made his statement to Arciniega, it was not because Arciniega had made a deal with appellant. However, appellant testified "we had already spoken with the FBI for five minutes before we went into the room where we spoke." Although appellant did not speak with the FBI agent about the murders, appellant testified that when Flores arrived, Flores said "they were working together."

Appellant acknowledged he had testified that within the five-minute period during which he had spoken with the FBI agent before appellant had spoken with Arciniega, the FBI agent had promised appellant that if he gave truthful information about his participation in the homicides, appellant would not be prosecuted for them. Appellant felt that that deal was official and ironclad. However, it was not until page 43 of the transcript reflecting Arciniega's first interview with appellant that appellant admitted being present at the scene of the instant murders. When appellant, having agreed to come forward and provide all information, first spoke with Arciniega, appellant claimed he did not know very much. Appellant did not trust "them" at that point. Appellant did not admit to police that he was in the car at the time of the shootings until after police informed him that they could prove he was in the car. Appellant waited until that time to admit he was in the car because the detective had said that appellant had killed the victims.

Appellant was returned to California and he arrived at night. When he arrived, he contacted his mother prior to his interview with police. Appellant asked his mother to get an attorney, and she replied that she already had obtained one. Appellant testified that, at the time he spoke with his mother, the only matter he had pending was a Los Angeles probation violation case.

Appellant denied that, at the Lennox jail, Arciniega read appellant his rights when Arciniega spoke with him. Appellant admitted that he knew his rights, but testified a deal already had been made. Appellant told Arciniega that appellant had an attorney, but also told Arciniega that appellant did not need his attorney because "we had already made a deal in New Orleans." Appellant then testified that Arciniega had told appellant that

appellant did not need his attorney because appellant already had made his deal. According to appellant, the deal was that he would be excluded from the case, and appellant and his family would be "take[n] care of." Appellant later testified that he made his deal with Flores after appellant had spoken to Arciniega in New Orleans.

(3) *Rebuttal Evidence.*

Los Angeles Police Detective Frank Flores, assigned to a federal gang task force investigating MS-13, testified he was also a deputized FBI agent at the time of his April 12, 2006 interview with appellant in New Orleans. FBI Agent Rivero was present when appellant was being questioned. According to Flores, there was no private conversation between Rivero and appellant just prior to Arciniega's interview of appellant.

Flores conducted a separate interview of appellant with Flores's partner, FBI Agent Jonathan Bauman. Flores did not tell appellant that if appellant did not cooperate, Flores would not protect him or his family. Flores did not tell appellant that if he cooperated with Flores's investigation of Comandari, Flores would exclude appellant from the present case and take care of him and his family. Flores made no such offer because he lacked the power to do so. An FBI agent could not make such an offer of leniency, and such a matter would have to be handled by the United States Attorney's Office. The issue of appellant's safety was discussed at the end of Flores's interview of appellant because appellant understood he was returning to Los Angeles based on a warrant. Flores did not recall appellant talking about the safety of his mother.

Flores had reviewed a report prepared by Rivero. The report pertained to Rivero's earlier interview of appellant. In the report, Rivero indicated that appellant was interested in cooperating with the FBI, and appellant was extremely afraid for the safety of himself and his family. The parties stipulated that appellant had suffered a prior robbery conviction.

(4) *The Trial Court's Ruling.*

After the presentation of evidence at the hearing, appellant argued, inter alia, that his statements were involuntary. The trial court denied appellant's motion to suppress the statements. The court found that the People had proven by a preponderance of the

evidence that both of appellant's statements were voluntary and that appellant did not invoke his Fifth Amendment right to counsel with regard to the second statement.

The court first noted the issue of credibility of witnesses. The court stated it found Arciniega and Flores to be forthright. The court also stated that Arciniega told appellant that Arciniega would try and help appellant with some of his concerns for the safety of himself and his family. However, the court indicated that that was not a benefit that appellant would not otherwise have obtained, and it was not the motivating factor behind appellant making his statement. The court believed Arciniega's testimony that the FBI told him that appellant wanted to talk about the case and appeared to be cooperative. The court denied that Arciniega's statements about protecting or doing what they could to protect appellant and his family were the inducements for appellant's statements.

The court stated it did not believe appellant's statement that Rivero promised leniency in this case. The court concluded Rivero would not have been authorized to make such a promise, had no reason to make it, and knew nothing about the murders. The court disbelieved that appellant could have relied on any such promise.[4]

b. *Analysis.*

Appellant claims his statements to detectives were involuntary. He suggests "the officer's implied as well as express promises of protection [were] a motivation for appellant's confessions." We reject his claim. "Under federal and California constitutional law, the prosecution must show voluntariness of a confession by a

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[4] The court noted there was a dispute between Arciniega and appellant concerning whether appellant invoked his right to counsel at the Lennox jail. The court noted as follows. According to Arciniega, appellant did not say that he had an attorney and the attorney wanted to talk to Arciniega. Arciniega went to the Lennox jail to talk to appellant, and Arciniega talked to appellant at 10:00 p.m. It was difficult to believe that, before Arciniega arrived, appellant made a phone call to his mother. Even assuming that that happened, appellant's testimony was not believable and was inconsistent. When defense counsel first asked appellant about needing an attorney, appellant testified that his mother had a lawyer for him, but that appellant told Arciniega that appellant did not need one because there was a deal. A few questions later, defense counsel asked appellant a leading question, and appellant's testimony changed. Appellant indicated it was Arciniega who told appellant that he did not need a lawyer because they had a deal.

preponderance of the evidence. [Citations.] . . . [¶] In reviewing a finding of voluntariness we make an independent examination of the record and determine the ultimate issue independently as well. With respect to conflicting testimony, however, we accept the version favorable to the People to the extent it is supported by the record. [Citations.]" (*In re Aven S.* (1991) 1 Cal.App.4th 69, 75-76.) A statement is involuntary only if it is the product of police coercion. (*People v. Mickey* (1991) 54 Cal.3d 612, 647.)

Moreover, "In general, ' "any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law." ' [Citations.] In identifying the circumstances under which this rule applies, we have made clear that investigating officers are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime. [Citation.] The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable. [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 339-340.)

We note that, in *United States v. Heatley* (S.D.N.Y. 1998) 994 F.Supp. 477, 483, the court concluded it was not improper for police to offer protection to allay fear that, if an individual cooperated with police, his family would be subject to recriminations. And *Miller v. Fenton* (3rd Cir. 1986) 796 F.2d 598, 610, observed, "[w]hile promises of help with collateral problems have been found, in combination with other coercive factors, to render confessions involuntary, [citation] in general, such promises are less coercive to the accused than promises directly related to the criminal proceedings at hand. [Fn. omitted.]"

People v. Price (1991) 1 Cal.4th 324, is illuminating. In that case, our Supreme Court concluded a trial court erred by precluding cross-examination of a People's witness on the issue of the prosecution's promise to protect the witness's family. However, *Price* held the error was harmless, stating, inter alia, "the evidence had only slight value for impeachment because it is unlikely that a witness would testify falsely to obtain

protection for family members when the protection is needed only because of the testimony. A promise is unlikely to be a significant inducement if its primary effect is to eliminate a negative consequence of the testimony rather than to provide a positive benefit." (*Id.* at p. 423.) Finally, "[t]he general rule throughout the country is that a confession obtained through use of subterfuge is admissible, as long as the subterfuge used is not one likely to produce an untrue statement. [Citation.]" (*People v. Felix* (1977) 72 Cal.App.3d 879, 886.)

We have recited the pertinent facts and will not repeat them here. There is no dispute appellant properly waived his *Miranda* rights in New Orleans. We agree with the trial court that the FBI made no promise of leniency pertaining to the present offenses. The trial court properly credited the prosecution testimony that the FBI said that appellant wanted to talk about the case and appeared to be cooperative.

Any references by Arciniega or Flores to protection for appellant or his family (especially in light of the questionable record of appellant's interview as reflected in the transcript thereof) were vague. Arciniega denied that he or anyone else ever promised appellant any form of leniency in exchange for appellant giving a statement to Arciniega with respect to the murders, denied that anything was promised in Arciniega's first or second interview with appellant, and denied that Arciniega ever told appellant anything to the effect that in order to get Arciniega's help for appellant's safety, appellant would have to make a statement about this case. Appellant himself testified Arciniega promised him nothing and that, when appellant made his statement to Arciniega, it was not because Arciniega had made a deal with appellant.

Moreover, any comments by Arciniega or Flores concerning protection reasonably could be construed as mere indications of what they would try to do. To the extent Arciniega or Flores promised protection, the promise pertained to a collateral matter not directly related to appellant's criminal proceedings and the promise was unlikely to have been an inducement because it is unlikely a person will testify falsely to protect the person or the person's family members when the protection is needed only because of the

testimony. It was not improper for Arciniega or Flores to offer protection to allay appellant's concern about the possibility of recriminations towards him or his family.

There was evidence that appellant was readvised of his *Miranda* rights after he returned to Los Angeles. Appellant's mere, if any, belief that his cooperation might have benefited his family did not invalidate his statements. (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 209.) The trial court discounted appellant's testimony and was not obligated to believe appellant. We agree with the trial court that any promises of protection did not induce, and were not appellant's motivation for, giving his statements to Arciniega or Flores.[5] There were no psychological ploys which, under all the circumstances, were so coercive that they tended to produce statements which were involuntary and unreliable. The trial court did not err by denying appellant's motion to exclude appellant's statements.[6]

2. *Imposition of the Penal Code Section 12022.53, Former Subdivision (d) Enhancements Was Proper.*

The jury found true beyond a reasonable doubt the Penal Code section 12022.53, former subdivisions (d) and (e)(1)[7] allegations pertaining to each of counts 1 and 2.

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[5] Moreover, the fact that Arciniega used a ruse (that appellant was heard on the phone admitting he had been at the crime scene) to get appellant to admit involvement in the instant shootings did not render his statements involuntary. Appellant previously had denied involvement and, if his denial had been true, appellant, after the ruse, simply could have continued to deny involvement and claim Arciniega's information was erroneous or fabricated. Arciniega's ruse was not likely to produce an untrue statement. (Cf. *People v. Felix, supra,* 72 Cal.App.3d at p. 886.) We note appellant asserts, "it was not the use of ruse evidence which broke appellant[.]"

[6] In light of our conclusion, there is no need to reach the issue of whether, even if appellant's statements during his first interview were involuntary, his statements during his second interview were nonetheless admissible for the additional reason that they were sufficiently independent.

[7] Penal Code section 12022.53, former subdivisions (d) and (e)(1) provide, in relevant part, "(d) Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), . . . intentionally and personally discharges a firearm and proximately causes great bodily injury, as defined in Section

Nonetheless, appellant claims that the imposition of the enhancements violated the rule prohibiting impermissible multiple convictions and violated federal double jeopardy principles. Appellant essentially argues (1) convictions for a greater offense and a lesser-included offense are barred by the multiple conviction rule and federal double jeopardy principles, (2) for purposes of those principles, the murder and the enhancement are each an offense, (3) the "element" of the enhancement that appellant proximately caused the victim's death is subsumed within the elements of the murder, (4) double jeopardy principles apply not only to successive prosecutions but to multiple punishment in a unitary trial, and (5) as a result, the enhancement must be stricken.[8] We reject his claim.

One of the premises of appellant's claim is that enhancement allegations may be considered for purposes of the multiple conviction rule. Moreover, appellant's double jeopardy argument appears to be based in part on the Fifth and Sixth Amendment principles enunciated in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), and the federal double jeopardy analysis of *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*).

In any event, *People v. Izaguirre* (2007) 42 Cal.4th 126, 128 (*Izaguirre*), rejected appellant's arguments, and we will not repeat its extensive analysis here. It is sufficient to state, as *Izaguirre* did, that "To the extent defendant claims enhancements should be considered when applying the multiple conviction rule to charged offenses, our holding in [*People v. Reed* (2006)] 38 Cal.4th 1224, controls. They may not. Beyond that, *Apprendi*, . . . requires only that the firearm-related enhancements below had to be found true by a jury beyond a reasonable doubt, which they were [this is equally true in the

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12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life. [¶] (e)(1) The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

[8] Appellant's second and third contentions raise, inter alia, double jeopardy issues. We address them all here.

present case]. *Seel's* interpretation of the scope of the holding in *Apprendi* pertained to an aspect of federal double jeopardy protection—protection against a *second* prosecution for the same offense after acquittal—that is not implicated in this case. (*Seel, supra*, 34 Cal.4th at pp. 548-549.)" (*Izaguirre, supra*, 42 Cal.4th at p. 134, italics added.)

Appellant argues *Izaguirre* is "flawed"; we disagree and, in any event, we are bound to follow it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Imposition of an enhancement pursuant to Penal Code section 12022.53, former subdivisions (d) and (e)(1) as to each of counts 1 and 2 did not violate the multiple conviction rule or double jeopardy principles.

3. *Imposition of Former Penal Code Section 1202.45 Parole Revocation Fines Was Error.*

Appellant's sentence included a prison term of life without the possibility of parole as to count 1, and a prison term of 25 years to life as to count 2. The trial court also imposed, as to each count, a $200 Penal Code section 1202.4, subdivision (b) restitution fine, and a $200 former Penal Code section 1202.45[9] parole revocation fine.

Appellant claims imposition of the former Penal Code section 1202.45 parole revocation fines was error because his sentence included a term of life without the possibility of parole as to count 1. We accept respondent's concession on the issue. (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819; *People v. Petznick* (2003) 114 Cal.App.4th 663, 687; *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1181-1186) and we will modify the judgment accordingly.

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[9] Former Penal Code section 1202.45 states, in relevant part, "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked."

DISPOSITION

The judgment is modified by striking the $200 former Penal Code section 1202.45 parole revocation fine as to each of counts 1 and 2, and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modifications.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.